IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-101

DEMOCRATIC NATIONAL COMMITTEE, *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, *Respondents,* CBS, INC., ET AL., *Intervenors.*

No. 76-205

THE HONORABLE SHIRLEY CHISHOLM, NATIONAL ORGANIZATION FOR WOMEN, AND OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL., *Respondents.*

On Petition For A Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

Brief Amicus Curiae of The League of Women Voters of the United States, Common Cause, and Aspen Institute Program on Communications and Society In Opposition

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BRIEF FOR AMICI CURIAE LEAGUE OF WOMEN VOTERS, COMMON CAUSE, AND ASPEN INSTITUTE PROGRAM IN OPPOSITION

INTEREST OF AMICI

Amicus League of Women Voters of the United States (LWVUS) is a nonprofit, nonpartisan civic membership corporation which has approximately 140,000 members throughout the United States. The LWVUS is exempt from federal income tax under Section 501(c)(4) of the Internal Code of 1954. The LWVUS's primary objective is, and has been since its founding more than 50 years ago, to promote political responsibility through informed and active citizen participation in government and to provide such other services as may be possible in the interest of education in citizenship. The LWVUS is precluded by its bylaws from engaging in partisan political activity. In 1957, the LWVUS created the League of Women Voters Education Fund (LWVEF), a nonprofit educational trust which is exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code of 1954, and contributions to it are deductible by donors for income tax purposes. The LWVEF is organized and operated exclusively for educational and other charitable purposes, and no substantial part of its activities can consist of the carrying on of propaganda or otherwise attempting to influence legislation. The LWVEF may not participate or intervene in any political campaign on behalf of any candidate for public office or be partisan in its approach to political campaigns.

The LWVUS, its local and state chapters, and the LWVEF have historically conducted a variety of educational activities with respect to elections. The LWVUS/LWVEF provide information concerning candidates for elective office and sponsor debates and

forums with candidates. The local and state chapters across the country regularly hold public meetings during the election to enable citizens to question candidates for public office, thus advancing the goal of an educated electorate. While over a hundred local chapters obtain broadcast coverage of candidate interviews, almost all of the 1300 local chapters sponsor public meetings. Experience indicates that these public meetings are viewed with interest by broadcasters. However, under the previous interpretations of Section 315 of the Communications Act of 1934, as amended[1] they have been reluctant to broadcast such events sponsored by a third party.

The LWVUS/LWVEF believe that the FCC's September 25, 1975 declaratory ruling[2] would remove the major obstacle to broadcast of these candidates meetings. Such action would assure that a greater number of citizens see and hear their candidates for public office and consequently, would assure that the public interest is well served.

Specifically, the LWVEF is planning to present a series of debates between President Ford and Governor Carter, and Senators Dole and Mondale. It has received favorable and serious consideration of these proposals from the candidates.[3] The LWVEF thus has

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[1] 47 U.S.C. sec. 315.

[2] *In re Petition of Aspen Institute Program*, 55 FCC 2d 697 (DNC App. 1a). The petition for a writ of certiorari filed by the Democratic National Committee ("DNC") has as appendices a copy of relevant opinions issued by the FCC and the Court of Appeals. Amici will refer to those appendices.

[3] See, e.g., *The Washington Post*, September 2, 1976, A1 ("Ford, Carter Open Debate Sept. 23").

great interest in securing television coverage of these proposed debates, to the end that the American electorate will be more fully informed concerning the choice for these most important offices.

Amicus Curiae Common Cause is a nonprofit District of Columbia corporation organized to promote, on a nonpartisan basis, social welfare, civic betterment, and social improvement in the United States. Among its major purposes is to facilitate achievement of these objectives by making government more responsive to public needs and demands through reform of the polical process. It has approximately 280,000 dues-paying members throughout the several states and the District of Columbia. Its membership includes citizens of the United States who have been, are, and intend to be:

(a) registered voters for candidates for federal, state, and local elective offices;

(b) candidates for election to federal, state, and local offices, and

(c) active participants in campaigns for election of candidates to federal, state, and local offices.

Amicus Curiae Common Cause and its members have a direct interest in:

(a) the obtaining of meaningful information on the positions of candidates for federal, state, and local office:

(b) maintaining an adequate opportunity for all candidates to disseminate their views; and,

(c) ensuring compliance with constitutional provisions and laws which preserve and protect the foregoing interests.

To promote these interests Common Cause has undertaken a national program for the 1976 campaign to ensure that its membership and citizens are provided with information in detail on how the candidates stand on issues, how the candidates respond to in-depth questioning, and how the candidates have performed over the course of their political lives. Common Cause intends to directly sponsor or encourage others to sponsor in-depth interviews, press conferences, debates, citizens' forums, and hearings in which issues will be fully explored and discussed by candidates for federal, state, and local office.

The Aspen Institute Program on Communications and Society (herein called Aspen Program) has an ongoing project to make the Bicentennial a model political broadcast year. As a part of that project, a conference of several experts with considerable experience in the political broadcast field was held on March 14, 1975 at Washington, D.C. And as a result of suggestions made at the conference, the Aspen Program, through its Director, Mr. Douglass Cater, on April 22, 1975 submitted the petition leading to the Commission action here on appeal.

Aspen Program's purpose in petitioning the Commission can best be pointed up by considering the proposed September 23, 1976 meeting at which the League has invited the major party candidates to debate. This meeting is page one, banner headlines in the Washington Post, Star or the New York Times. The networks also would like to cover the event as only broadcast journalism can uniquely do—an on-the-spot telecast. But if they do and the carriage is not exempt from the equal opportunities requirement of Section 315, they

will have to give equal amounts of free prime time to, say, 13 other "fringe party" candidates.[4] This would be wholly impractical, amounting to many hours and millions of dollars of prime time.[5]

What is the result, then, if carriage of the debate is held to come within the equal time requirement? The debate is not covered by the networks, and unlike the case in the Great Debates of 1960, the American people cannot hear and make their own assessment of the two major party candidates in this uniquely informative context. The fringe party candidates also do not receive any time. There is simply a black-out in this important respect.

That this is the pattern if the equal time requirement is fully applicable is borne out by the consistent testimony of the expert agency, FCC, to the Congress:[6]

[4] This is not fanciful. In 1960 at the time of Nixon-Kennedy debate and the suspension of the equal time requirement, there were on the ballots in several States, 14 other candidates for the Office of President: C. Benton Coiner, Conservative Party of Virginia; Merritt Curtis, Constitution Party; Lar Daly, Tax Cut Party; Dr. R. L. Decker, Prohibition Party; Farrell Dobbs, Socialist Worker and Farmers Party, Utah; Orval E. Faubus, National States Rights Party; Symon Gould, American Vegetarian Party; Eric Hass, Socialist Labor Party, Industrial Government Party, Minnesota; Clennon King, Afro-American Unity Party; Henry Krajemski, American Third Party; J. Bracken Lee, Conservative Party of New Jersey; Whitney Harp Slocomb, Greenback Party; William Lloyd Smith, American Beat Consensus; Charles Sullivan, Constitution Party of Texas. See H. Rep. No. 1947, 90th Cong., 2d Sess., 3 (1968).

[5] In 1964, the estimates were $2,500,000, if the networks agreed to give equal time to seven other candidates because of a telecast by President Johnson. *Goldwater* v. *Federal Communications Commission*, Case No. 18963, D.C. Cir., (Br. for Federal Communications Commission, 19). The figures would be much higher today.

[6] Hearings on H.R. 13721 before House Subcommittee on Communications and Power, 91st Cong., 2d Sess., June 2, 1970, 5 (Statement of FCC Chairman Burch).

> "In short, section 315 in its present form would appear, as is claimed, to inhibit broadcasters from affording free time to major presidential candidates—and does so, we urge, without any significant practical compensating benefits. The effect of section 315 is not that the Socialist Labor or Vegetaria. candidate gets free time; rather, no one gets any substantial amounts of free time for political broadcasts . . ."

The record fully supports the above conclusion: The networks afford free time only when the program is exempt from the equal time requirement. Fringe party candidates receive coverage only if there is a "fluke" —an isolated mistake by the commercial broadcaster as to applicability of the equal time requirement.

The situation is entirely different if coverage of the joint appearance of the major party rivals at the debate is an exempt program. The networks thereupon present it as on-the-spot coverage of a most important news event, and the American public, just as in the case of the 1960 Great Debates, are better informed—have a better measure of the major party candidates. As a further consequence, a substantial third party candidate, such as George Wallace was in 1968, also receives some significant coverage, although not equal time, with the amount left to the good faith and reasonable judgment of the networks (and subject to review by the FCC or the courts on a fairness complaint only for arbitrariness). The fringe party candidates may receive several minutes of time, as, for example, NBC accorded them in broadcasts in several election years.[7]

[7] E.g., in 1960 NBC invited seven minority party candidates to use air time on an October 30, 1960 program (see Statement of Mr.

Amici submit that the public interest, and particularly the purposes of the First Amendment in promoting robust, wide-open debate, are markedly served by this second course of action. Believing that this course was open to the broadcasters and the Commission under the 1959 Amendments to the law, Aspen Program submitted its petition.[8]

STATEMENT

The essential facts are few and clear:

- In three rulings in 1962 and 1964 (the last by a 4-3 vote), the Commission gave a restrictive construction to the fourth exemption in Section 315 (a) which provides that a broadcaster's on-the-spot coverage of bona fide news events does not come within the "equal opportunities" requirement of the section.[9] In substantial part, the Commission erroneously relied upon a facet of the legislative history that had been repudiated in the conference between the houses.[10]

Robert Kintner, before Senate Communications Subcommittee, January 31, 1961); in 1972 it invited four minority party candidates. NBC states that it will continue this practice; "We have undertaken, and we undertake now, to present minority party candidates on a basis that fully recognizes their following and their importance." Hearings on S.2 before the Senate Communications Subcommittee, 94th Cong., 1st Sess., 80 (1975).

[8] Amici adopt the questions presented and full statement of the case set out in respondents' brief in opposition. The statement that follows is therefore truncated.

[9] *The Goodwill Stations, Inc. (WJR)*, 40 FCC 362 (1962); *National Broadcasting Co. (Wyckoff)*, 40 FCC 370 (1962); *Columbia Broadcasting System, Inc.*, 40 FCC 395 (1964).

[10] See *The Goodwill Stations, Inc. (WJR), supra*, 40 FCC at 364; compare 105 Cong. Rec. 16231, 16241-2 (and H. Rep. 802, 86th Cong., 1st Sess., 2, 7 (1959)) with 105 Cong. Rec. 17778 (and H. Conf. Rep. No. 1069, 86th Cong., 1st Sess., 4 (1959)).

- In 1968, the Court of Appeals sustained the Commission's construction, stating that it found "... no basis for disturbing the Commission's exercise of discretion in issuing the order on review herein, *Philadelphia Television Broadcast Co.* v. *FCC*, 359 F. 2d 282 (D.C. Cir. 1966) ..."[11]
- In 1975, upon the petition of Aspen Institute the Commission, again by divided vote (5-2), set aside the above rulings and issued a new declaratory ruling giving Section 315(a)(4) a construction promoting its broad remedial purpose (DNC App. 7a-12a). The Commission specifically noted its erroneous reliance on faulty legislative history (DNC App. 7a-9a). It also took into account a new development—that the fairness doctrine now affords candidate protection through prompt consideration of their complaints, unlike in 1962 when the doctrine was implemented only at renewal time (DNC App. 12a, n. 18).
- The Court below again affirmed, finding that the legislative history, while inconclusive, affords "... much support for the Commission's new interpretation [and that therefore] we are obligated to defer to the Commission's interpretation, even if it is not the only interpretation possible" (DNC App. 58a-59a).

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[11] *Taft Broadcasting Co.* v. *Federal Communications Commission*, Case No. 22445, D.C. Cir. (unreported), affirming *In re Socialist Labor Party*, 15 FCC 2d 98 (1968).

ARGUMENT

1. The Court below correctly found that the Commission's new construction of Section 315(a)(4)[12] fell within the agency's discretion (DNC App. 59a). See *Philadelphia Television Broadcasting Co.* v. *FCC, supra.* The Congress also stressed the Commission's wide discretion in construing the scope of the exemptions. S. Rep. No. 562, 86th Cong., 1st Sess., 12 (1959).

Taking the words of the statute in their ordinary sense, *Rosenman* v. *United States,* 323 U.S. 658, 661 (1945); *Labor Board* v. *Highland Park Co.,* 341 U.S. 322, 324-25 (1951), there is no question but that a common sense view of the phrase, "on-the-spot coverage of bona fide news events", includes a political news event such as the proposed League Debates. The event *is* news—indeed, page one headline news in the newspapers. It is a bona fide news event, since it is a joint appearance before an outside group that will occur in any event. The statutory language gives one example of a news event—"... including but not limited to political conventions ...". Surely the League debate is the same kind of political event as the acceptance speech of the candidate at the convention.

This last point deserves emphasis. The decided cases show that the exemption in 315(a)(4) covers a range of news events such as broadcasts of court proceedings, even though the judge had become a candidate for

[12] The test, in the Commission's words, "allows reasonable latitude for exercise of good faith news judgments by broadcasters and networks by leaving the initial determination as to eligibility for section 315 exemption to their reasonable good faith judgment." *In re Petition of Aspen Institute Program, supra,* 55 FCC 2d at 708 (par. 30), (DNC App. 12a).

office,[13] a report by the President to the nation on extraordinary international developments (e.g., the Chinese nuclear explosion),[14] a parade or "bridge ribbon-cutting event",[15] and the acceptance speech of the candidate at the convention. There is no sensible or logical way for the Commission to hold all these events as within the exemption and the League debates as outside. Indeed, the only common sense approach is the standard set out in the September 25, 1975 ruling, affording the licensee discretion to make reasonable, good faith news judgments.[16]

The Commission's approach of September 25, 1975 is the only one that makes sense out of the three relevant facets of the 1959 provision.[17] The broadcaster is

[13] *In re Complaint of Thomas Fadell,* 40 FCC 379 (1963), affirmed *Fadell* v. *United States,* No. 14142, 7th Cir., April 29, 1963, unreported.

[14] *Complaint of Republican National Committee,* 40 FCC 408 (1964), affirmed by evenly divided Court, *Goldwater* v. *Federal Communications Commission,* Case No. 18963, D.C. Cir. 1964, *certiorari denied,* 379 U.S. 893 (1964).

[15] See *Use of Broadcasting Facilities by Candidates for Public Office,* 35 Fed. Reg. 13048, 3055 (No. 24) (1970); S. Rep. No. 562, *supra,* at 9.

[16] Such an approach does not render meaningless the other three exceptions to Section 315, or the action of Congress exempting the "Great Debates" through Public Law 86-677. For there would still be a need (i) for the 1960 suspension to facilitate free time to the candidates in any broadcast offered format, including the broadcast debates or (ii) for the 1959 exemptions of bona fide news interviews or documentaries. These are not on-the-spot coverage of news events —they are studio matters. See 106 Cong. Rec. 13424 (1960). See discussion in FCC's September 25th ruling, pars. 25, 26, 28, DNC App. 9a-11a. And it certainly does not render nugatory the main thrust of Section 315—that when a broadcaster sells or gives time to one candidate, it must afford equal opportunities to rival candidates.

[17] Section 315(a)(3), the exemption for the documentary, is not

admittedly given wide discretion to make good faith news judgments in newscasts seen by millions each evening of the campaign; similarly, he can present the candidates to millions of viewers in news interview programs. In both instances, the public interest is further protected by the express applicability of the fairness doctrine (see Section 315(a); *infra,* pp. 14-15). But then, it is argued, the broadcaster is not to be afforded similar reasonable discretion as to the exemption for on-the-spot coverage of news events, and fairness is not suitable back-up protection as to that exemption. Simply on the face of the statute, the latter argument obviously lacks merit.[18] Its illogic is pointed up by consideration of one example—the proposed League debate. The broadcasters are entrusted with wide discretion to select the portions of this news event to be shown on their newscasts but, it is argued, have no journalistic discretion to cover the entire event.

Finally, and most important, the Commission's new construction of Section 315(a)(4) serves to promote robust, wide-open debate. As we have shown (pp. 5-7) the contrary construction inescapably "dampens the

relevant here, because, unlike the other three exemptions, it is expressly limited to the situation where the candidate's appearance is "incidental" to the subject matter of the documentary.

[18] Further, licensees are not reluctant to present candidates on newscasts or news interview shows, which by definition are regularly scheduled. On-the-spot coverage of news events usually requires the licensee to preempt profitable entertainment programming—something it is reluctant to do. Thus, licensees only infrequently engage in the latter process, and when they do, their actions stand out prominently. For these pragmatic reasons, the hole carved into the equal time requirement by the newscast exemption is far greater and more subject to abuse than that for on-the-spot coverage of news events.

vigor and limits the variety of public debate", *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 279 (1964). It follows that the Commission correctly construed the statute to avoid this serious constitutional issue in the sensitive First Amendment area.

2. The legislative background to Section 315(a)(4) fully supports the Commission's view.[19] Thus, Senator Scott noted that the term news has a "very broad definition"—"[o]f current interest".[20] Chairman Pastore agreed that ". . . news events would necessarily have reference to current events of news importance".[21] Chairman Harris stated that the phrase *"bona fide"* was intended to set up "a test which appropriately leaves reasonable latitude for the exercise of good faith news judgment on the part of broadcasters and networks . . . it is not intended that the exemption shall apply where such judgment is not exercised in good faith . . . [but rather] for [the] purpose [of promoting] the political fortunes of the candidate making an appearance . . .".[22] This shows that good faith journalistic test of (a)(1) and (2) is equally applicable to (a)(4).[23]

[19] We focus on that legislative history because it is obviously crucial. For, the exemption provision of Section 315 has never been amended by the Congress. Thus, any discussions in later Congresses would be of little, if indeed any, significance.

[20] 105 Cong. Rec. 17832.

[21] 105 Cong. Rec. 17830.

[22] 105 Cong. Rec. 17782. This echoes the Conference Report, which stresses that the term bona fide means in the exercise of bona fide news judgment and "where the appearance of a candidate is not designed to serve the political advantage of that candidate". (H. Conf. Rep. No. 1069, 86th Cong., 1st Sess., 4.) And see also S. Rep. No. 562, *supra,* at 14 ("The proposal affords the licensee freedom to exercise his judgment in the handling of this type program . . .").

[23] The test of good faith does afford the licensee "reasonable

It is true that the Congress, in the 1959 Amendments, ". . . did not attempt to destroy the philosophy of equal time; it merely made exceptions . . ."[24] But Congress "surely . . . wants to permit on-the-spot news",[25] and *it was willing to take risks* to make it possible for broadcasters "to cover the political news to the fullest degree".[26] This is stated several times during the floor debate.[27] And it was set forth in S. Rep. No. 562, *supra,* at 10: "The public benefits are so great that they outweigh the risk that may result from the favoritism that may be shown by some partisan broadcasters." Cf. *Columbia Broadcasting System* v. *Democratic National Committee,* 412 U.S. 94, 125 (1973) ("calculated risks of abuse are taken in order to preserve higher values."). Prior to its September 25, 1975 decision, the Commission had not followed this balance struck by Congress: It had reduced the risks markedly, but at the expense of achieving the broad remedial purpose of the 1959 legislation.

3. Equally important, the Commission's policies have changed in a way that greatly reduces any risk in giving the amendments their common sense construction

latitude", but it is nevertheless reviewable by the Commission. Barring an extraordinary situation, the Commission would not seek to draw inferences from the programming itself but rather would generally look to independent extrinsic evidence (e.g., the testimony of some station employee). Cf. *Columbia Broadcasting System, Inc. (Hunger in America),* 20 FCC 2d 143, 150-51, (1969).

[24] Statement of Senator Magnuson, 105 Cong. Rec. 14444.

[25] *Ibid.*

[26] *Id.* at 14451.

[27] E.g., statement of Senator Pastore, 105 Cong. Rec. at 14440, 14445.

in line with Congress' remedial purpose. At the time when Congress adopted the 1959 exemptions, there was no back-up relief for the candidate if a station acted unfairly in some exempt situation. For, the Commission considered fairness issues only at renewal, and Congress understood that while that might be a deterrence, it would provide no relief in the context of the campaign.[28] But in 1963 the Commission changed its fairness procedures to rule promptly on fairness complaints, particularly because "a practice of waiting for renewal would be most unfair to candidates in political campaigns and would militate against the all-important goal of an informed elctorate in this vital area."[29] On this ground alone, it was appropriate for the Commission to re-examine its restrictive approach to 315 (a) (4).[30]

[28] See S. Rep. No. 562, *supra,* at 12; 105 Cong. Rec. 14440, 14445.

[29] *Letter to Chairman Oren Harris,* 40 FCC 582, 584 (1963). The Commission has never failed to rule timely on the political fairness complaints (i.e., before the election).

[30] There is the additional consideration that the Commission in 1970 issued the *Letter to Mr. Nicholas Zapple* ruling, 23 FCC 2d 707 (1970)—"a particularization of what the public interest calls for in certain political broadcast situations in light of the Congressional policies set forth in Section 315(a)(4)". *First Report,* 39 Fed. Reg. 26385, 26387 (1972). The *Zapple* ruling states that even in non-equal time situations, the broadcaster must treat the major party political candidates in roughly comparable fashion—that is, quasi-equal opportunities. For, the Commission explained (*id.* at 26388):

> . . . If the DNC were sold time for a number of spots, it is difficult to conceive on what basis the licensee could then refuse to sell comparable time to the RNC. Or, if during a campaign the latter were given a half-hour of free time to advance its cause, could a licensee fairly reject the subsequent request of the DNC that it be given a comparable opportunity? [footnote omitted] Clearly, these examples deal with exaggerated, hypo-

CONCLUSION

The decision below is thus correct.[31] Even assuming *arguendo* that it were not, the court below soundly pointed out that if the new construction of Section 315 (a)(4) is in error, Congress would act speedily to repair the situation affecting as it does the political fortunes of the entire membership.[32] Congress has not acted because it obviously does not share petitioners' belief that Section 315 has been gutted.

Significantly, the 1960 suspension worked and served to better inform the electorate, without any unfairness.[33] Yet it is now argued that the much more modest FCC action of September 25, 1975 will have disastrous consequences to the presidential electoral process.

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thetical situations that would never arise. No licensee would try to act in such an arbitrary fashion. Thus, the *Zapple* ruling simply reflects the common sense of what the public interest, taking into account underlying Congressional policies in the political broadcast area, requires in campaign situations such as the above (and in view of its nature, is confined to campaign periods) . . .

[31] Petitioners' argument (Chis. Pet. 15-18) that rulemaking was necessary ignores the consideration that this interpretative ruling on the legal issue involved—the proper construction of Section 315 (a)(4)—upset prior *ad hoc* rulings. The Commission's procedure, which afforded petitioners a full opportunity to advance their arguments, was within the agency's discretion in the circumstances. See *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194 (1947); *Pesikoff* v. *Secretary of Labor*, 501 F. 2d 757, 763 (D.C. Cir. 1974), *certiorari denied*, 419 U.S. 1038 (1974).

[32] Cf. S. Rep. No. 562, *supra*, at 11 ("Should the broadcaster abuse the discretion granted herein, the Committee will move forward immediately to remedy the situation").

[33] See, e.g., Hearings on H.R. 13721 before House Subcommittee on Communications and Power, 91st Cong., 2d Sess., 10-11 (1970); Hearings on H.J. Res. 247 before House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess., 47 (1963).

The petitions for certiorari should be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have caused to be served, by First Class United States Postal Service, a copy of the Brief Amicus Curiae of the League of Women Voters of the United States, Common Cause, and the Aspen Institute program, on the following counsel of record, this 10th day of September, 1976:

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